9-12-2011

State v. Lester Respondent's Brief Dckt. 38023

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38023
	)	
vs.	)	
	)	
WILLIAM JOHN LESTER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature Of The Case

William J. Lester appeals from the judgment of conviction entered upon a jury verdict of guilty of lewd conduct with a minor under sixteen years of age.

Statement Of The Facts And Course Of The Proceedings

In 2008, K.A.M. (born [redacted]) lived with her father most of the time, but spent every other weekend at her mother's house in Eagle, Idaho, where her mother's boyfriend, William Lester ("Lester"), also lived.[1] (Tr., Vol. 5, p.32, Ls.10-22; p.37, L.16 – p.38, L.23; p.121, Ls.16-24.) K.A.M. had two half sisters, E.S. (five years old at the time of retrial), and A.G. (seventeen at the time of retrial), but they did not live with K.A.M. and her father. (Tr., Vol. 5, p.33, Ls.9-11; p.34, Ls.24-25.)

One "stay-home" day when K.A.M. was eight years old, she was at her mother's home during the daytime with E.S., when Lester told K.A.M. to go into his (and K.A.M.'s mother's) bedroom, and that they were going to make candy for K.A.M.'s mother. (Tr., Vol. 5, p.41, L.7 – p.43, L.4.) After Lester followed K.A.M. into his bedroom, he tied a cloth blindfold over her eyes, preventing her from seeing anything. (Tr., Vol. 5, p.43, L.13 – p.44, L.5.) K.A.M. thought the bedroom door was closed before she was blindfolded, and after Lester blindfolded her, he sat down and told her they were making candy for her mother, and gave her some lotion. (Tr., Vol. 5, p.44, Ls.10-25.) K.A.M. had seen a container of lotion on the bedroom dresser before she was blindfolded, and

[1] K.A.M.'s parents divorced in 2003. (Tr., Vol. 5, p.132, Ls.4-5.)

described it as "round and in a circle, like a jar that is open on the top. (Tr., Vol. 5, p.45, L.18 – p.46, L.5.)

After Lester put K.A.M.'s hand into the lotion container, he had her rub lotion, using both hands, up and down on what she recognized to be his "private," which she said "was up towards the ceiling and it felt like skin, and it was kind of bumpy." (Tr., Vol. 5, p.47, Ls.4-23; p.48, Ls.11-13; p.49, L.11 - p.50, L.7.) K.A.M. further described the body part Lester had her rub with lotion as being shaped like a finger, but bigger. (Tr., Vol. 5, p.47, L.24 – p.48, L.4.) When Lester told K.A.M. to "suck on it and bite it," she complied. (Tr., Vol. 5, p.50, Ls.12-18.) When she was biting him, Lester said, "Don't bite too hard." (Tr., Vol. 5, p.50, Ls.19-24.) At some point, the sexual contact "just stopped," and when Lester took the blindfold off K.A.M., she saw that he had all of his clothes on. (Tr., Vol. 5, p.51, Ls.3-9.)

K.A.M. did not tell anyone about what Lester had done to her until August of 2009 when she was alone with her older sister, A.G., while visiting at A.G.'s grandmother's house. (Tr., Vol. 5, p.54, L.23 – p.57, L.20; p.83, Ls.8-14; p.97, L.23 – p.99, L.23.) Because K.A.M. and A.G.'s mother was in jail at that time, A.G. waited until she was released from jail, about a week or two, before telling her mother what K.A.M. had disclosed. (Tr., Vol. 5, p.100, Ls.7-23.) On August 22, 2009, Boise Police Officer Adam Crist responded to a call by K.A.M.'s mother to go to a residence in Boise, where he contacted K.A.M.'s mother and K.A.M., and took an initial report before switching the call to the Ada County Sheriff's Office because the incident reported had occurred outside Boise City. (Tr., Vol. 5, p.2, L.10 – p.13, L.22.)

Lester was charged with two counts of lewd conduct with a minor under sixteen, one count for oral-genital contact with E.S., and one count for oral-genital and manual-genital contact with K.A.M. (R., pp.15-17.) During the initial jury trial, E.S. was unable to testify while on the witness stand, and the district court declared a mistrial. (R., p.96; Tr., Vol. 3, p.219, L.9 – p.225, L.24.) After a new trial date was set (R., pp.99-100), Lester was tried in regard to the count involving K.A.M. as a victim, and convicted by a jury of lewd conduct with a minor under sixteen. (R., pp.135, 144). The court imposed a unified 20-year sentence with five years fixed. (R., pp.164-168.) Lester filed a "Motion for Reconsideration of Sentence and for Leave" (R., p.176), which was denied (Mem. Dec. and Order Re: Rule 35; *see* this Court's 6/20/11 "Order"). Lester timely appealed. (R., pp.171-174.)

ISSUES

Lester states the issues on appeal as:

1. Did the district court err, and violate Mr. Lester's Sixth and Fourteenth Amendment right to confrontation at trial, when the court refused to permit Mr. Lester to recross examine K.A.M. in light of the line of questioning and her specific responses that were brought out during the State's re-direct examination?

2. Did the prosecutor in this case commit misconduct during closing arguments by asking the jury to draw an adverse inference against Mr. Lester based upon his exercise of his Fifth Amendment right to remain silent?

3. Does the cumulative effect of these errors require reversal of Mr. Lester's judgment of conviction and sentence?

The state wishes to rephrase the issues on appeal as:

1. Has Lester failed to show that the district court abused its discretion by refusing to allow Lester to engage in recross-examination of K.A.M.?

2. Has Lester failed to establish his Fifth Amendment right to remain silent was violated by the prosecutor's closing argument because Lester was not silent?

3. Has Lester failed to show that the cumulative error doctrine applies to this case?

ARGUMENT

I.

Lester Has Failed To Show That The District Court Abused Its Discretion By Refusing To Allow Him To Engage In Recross-Examination Of K.A.M.

A. Introduction

At the end of the state's redirect-examination of K.A.M., the prosecutor asked her a series of questions about what could happen if she lied as a witness, as follows:

> Q. Okay. You know, [defense counsel] earlier on asked you what you thought could happen if a person – if you lied, for instance, in the courtroom.
>
> Do you remember that – those questions?
>
> A. Yes.
>
> Q. Now, when he asked you, do you think that the Judge could put you in jail, you shrugged your shoulders. Did I get that right? Did you go like this –
>
> A. Yes.
>
> . . . .
>
> Q. Okay. And so is it possible – in your brain, do you think it's possible for a person to go to jail if they lie in court?
>
> A. Yes.
>
> Q. Okay. You're just not sure whether he would do that to you?
>
> A. Yes.
>
> Q. Okay.
>
> A. But I know I would be in big trouble.
>
> Q. Okay. Do you think that grownups can tell when a kid is lying?

A. Yes.

Q. Do you think these grownups can tell if you you're [sic] lying?

A. Yes.

Q. Do you think Judge Owen can tell if you're lying?

A. Yes.

(Tr., Vol. 5, p.91, L.2 – p.92, L.7.)

After Lester's attorney asked if he could "inquire," the trial judge said: "typically I don't allow recross, and I didn't. You had a full opportunity to cross-examine. So we had direct, cross-examination and redirect." (Tr., Vol. 5, p.92, Ls.21-24.) After the judge invited counsel to make a record of his objection, Lester's attorney made an offer of proof that he "would have asked the child if she had ever told a lie before," and explained that he had been allowed to ask that question in the first trial, and that the prosecutor's "redirect, talking about what would happen if [K.A.M.] told a lie in court, reintroduced the question of her telling a lie."[2] (Tr., Vol. 5, p.92, L.24 – p.93, L.10.) The judge denied Lester's request to conduct recross-examination with K.A.M., stating that counsel could have asked K.A.M. the proposed question on cross-examination, but did not. (Tr., Vol. 5, p.94, Ls.1-17.)

Although Lester's trial attorney argued that he be permitted to conduct recross-examination with K.A.M. for the purpose of asking her whether she had ever lied before, on appeal Lester contends the district court abused its discretion when it denied him the opportunity to conduct recross-examination of K.A.M in order to ask her about her

[2] Lester's trial attorney implied that he forgot to ask K.A.M. during cross-examination whether she had ever lied. (Tr., Vol. 5, p.93, Ls.19-22 ("And if by inadvertence somebody forgets to ask a question . . . .").)

testimony during the state's re-direct examination that "she believed all adults would know if she were telling a lie."[3] (Appellant's Brief, p.10.) Lester argues:

> The State at Mr. Lester's trial opened up a new line of questioning of the alleged victim in this case regarding whether this victim was telling the truth because she believed that all adults would know if she were telling a lie. Notwithstanding the fact that this testimony went to the heart of the credibility contest that was the core issue within this case, and despite the fact that this line of questioning only arose during the State's re-direct examination of K.A.M., the district court refused to permit Mr. Lester to re-cross examine K.A.M. on this issue.

(Appellant's Brief, p.10.) In short, Lester claims the district court erred by not permitting his trial attorney to conduct recross-examination with K.A.M. in regard to her "belief that all adults would be able to know she was lying if she were to tell a lie."[4] (Appellant's Brief, p.14.)

This Court should refuse to consider Lester's argument that the district court abused its discretion by denying trial counsel's request to recross-examine K.A.M. about her belief that "all adults" (*see* fn.3, *supra*) can tell when she is truthful because that issue was not presented to the trial court. Instead, Lester's trial attorney requested that he be allowed to ask K.A.M. if she had ever told a lie. Moreover, the questions that supposedly "opened the door" to recross-examination cited by Lester on appeal are not the same as those argued at trial. Inasmuch as the questions Lester contends he was entitled to ask K.A.M. in a recross-examination, and the prosecutor's questions he

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[3] On appeal, Lester states that K.A.M. testified she believed that "all adults" or "any adult" would know if she were telling a lie. (*See* Appellant's Brief, pp.10 ("all adults"), 12 ("any adult"), 14 ("all adults").) However, K.A.M. merely answered "yes" when asked if she thought "grown-ups can tell if you you're [sic] lying." (Tr., Vol. 5, p.92, Ls.2-4.)

[4] Lester acknowledges his trial counsel argued that "the State opened the door for him to ask K.A.M. whether she had ever lied to adults in the past." (Appellant's Brief, p.13.)

claims "opened the door" to recross-examination, are not the same as those presented to the trial court, Lester has failed to preserve this issue for appeal.

Regardless of whether Lester's claim has been preserved for appeal, the prosecution did not open the door to any new line of questioning or matter that warranted recross-examination of K.A.M. To the contrary, it was Lester's own attorney, during cross-examination of K.A.M., who opened the line of questions by asking K.A.M. what would happen if she didn't tell the truth, and if there was any way the trial judge would know if she was telling the truth or not. (Tr., Vol. 5, p.65, L.14 – p.66, L.16.) Further, the different questions Lester's trial and appellate counsel assert should have been asked on recross-examination of K.A.M. would have had, at best, only marginal relevance to K.A.M.'s credibility. Therefore, the district court did not abuse its discretion in denying Lester's request to conduct recross-examination of K.A.M. about whether (as requested by trial counsel) she had "ever told a lie before" (Tr., Vol. 5, p.93, Ls.1-2), or (as requested by Lester on appeal) to ask about her "belief that all adults would be able to know" if she was lying (Appellant's Brief, p.14).

B. Standard Of Review

The control of cross-examination is committed to the sound discretion of the trial judge. State v. Rauch, 144 Idaho 682, 685, 168 P.3d 1029, 1032 (Ct. App. 2007). A decision to admit or deny evidence will not be disturbed on appeal absent a clear showing of abuse of that discretion. Id. When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether

the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by exercise of reason. Id.

C. Lester Has Failed To Preserve This Issue For Appeal

It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal. State v. Vondenkamp, 141 Idaho 878, 885, 119 P.3d 653, 660 (Ct. App. 2005) (citing State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000)). Moreover, I.R.E. 103(a)(1) requires "a party opposing proffered evidence" to "make a timely objection stating the specific ground of objection unless the specific ground is apparent from the context." Id. "An objection on one ground will not preserve a separate and different basis for excluding the evidence." Vondenkamp, 141 Idaho at 885, 119 P.3d at 660 (citing State v. Norton, 134 Idaho 875, 880, 11 P.3d 494, 499 (Ct. App. 2000); State v. Enyeart, 123 Idaho 452, 454, 849 P.2d 125, 127 (Ct. App. 1993)).

On appeal, Lester claims the district court erred by not permitting his trial attorney to conduct recross-examination with K.A.M. in regard to her "belief that all adults would be able to know she was lying if she were to tell a lie." (Appellant's Brief, p.14.) However, that request was not made by Lester's attorney during trial. Instead, Lester's attorney made an offer of proof that he "would have asked the child if she had ever told a lie before." (Tr., Vol. 5, p.92, L.24 – p.93, L.10.) Additionally, the sole explanation offered on appeal for how the door was opened for recross-examination of K.A.M. is that the prosecutor asked her during redirect examination if "she believed that

all adults would know if she were telling a lie." (Appellant's Brief, p.10.) Once more, that ground is not the same as was presented by Lester's trial counsel -- he claimed the prosecutor opened the door by "talking about what would happen if [K.A.M.] told a lie in court." (Tr., Vol. 5, p.93, Ls. 7-10.) Because Lester did not argue at trial what he now argues on appeal in regard to either the questions sought to be asked in recross-examination of K.A.M., or the testimony that "opened the door" to such recross-examination, he has failed to preserve this issue, and this Court should not consider it.

D. Lester Has Failed To Show That The District Court Abused Its Discretion Or Violated Lester's Right To Confrontation When It Denied His Request To Conduct Recross-Examination Of K.A.M. By Asking Whether She Had Ever Lied

Idaho Rule of Evidence 611(b) provides: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." "The appropriate scope of cross-examination includes not only the facts testified to on direct examination, but other facts connected with those facts, directly or indirectly, tending to explain, modify, or qualify the inferences resulting from the direct examination." Rauch, 144 Idaho at 685, 168 P.3d at 1032. In regard to recross-examination, the Idaho Supreme Court has explained:

> While it is true that when new evidence is elicited on redirect examination, the opposing party must be given the right of recross-examination on the new material, such is not the case here. Our examination of the record discloses no new evidence that was opened up on redirect examination. The court did not err in not permitting recross-examination by the four defense attorneys.

State v. Miles, 97 Idaho 396, 399, 545 P.2d 484, 487 (1976) [footnote omitted], *overruled on other grounds by* State v. Bottelson, 102 Idaho 90, 625 P.2d 1093 (1981);

see State v. Faulkner, 381 N.E.2d 934, 936-937 (Ohio Sup. Ct. 1978) (citing Miles in support of statement, "We hold that where . . . no new matters are explored on redirect examination, it is not an abuse of discretion for the trial court to deny defense counsel's request to conduct a re-cross-examination."). Similarly, although the Sixth Amendment guaranteed Lester an opportunity to impeach the witnesses against him, the right is not unlimited. As explained in United States v. Baptista-Rodriguez, 17 F.3d 1354, 1370-1371 (11th Cir. 1994):

> The Confrontation Clause guarantees criminal defendants an opportunity to impeach through cross-examination the testimony of witnesses for the prosecution. [Citations omitted.] As discussed . . . above, however, this right is not unlimited. Trial judges retain wide latitude to impose reasonable limits on cross-examination based on concerns about, among other things, confusion of the issues or interrogation that is repetitive or only marginally relevant. [*Delaware v.*] *Van Arsdall*, 475 U.S. [673] at 679 [1986] . . . ; *see Olden v. Kentucky*, 488 U.S. 227, 231 . . . (1988). Such restrictions are reviewed solely for abuse of discretion. *See, e.g., United States v. Cohen*, 888 F.2d 770, 775 (11th Cir. 1989). A defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witness and enables defense counsel to establish a record from which he properly can argue why the witness is less than reliable. *United States v. Bennett*, 928 F.2d 1548, 1554 (11th Cir. 1991); *see* [*United States v.*] *Sheffield*, 992 F.2d [1164] at 1168 [11th Cir. 1993].

There was no abuse of discretion here, under either I.R.E. 611(b) or the Sixth Amendment's Confrontation Clause. The prosecutor's redirect of K.A.M. did not produce any new subject area or material which opened the door for Lester's trial attorney to ask K.A.M. on recross-examination whether she had ever lied, or to inquire about her belief that adults can tell when she is lying. The following colloquy reveals that during his cross-examination of K.A.M., Lester's trial attorney asked her what would

happen if she did not testify truthfully, and if the *trial judge* (vis-à-vis adults) would be able to know if she was being truthful:

Q. What do you think would happen to you if you didn't tell us the truth?

A. I would get in very big trouble.

Q. And what kind of trouble would that be?

A. Big, big trouble.

Q. What does that mean to you?

A. I would be gone for a long time from my dad, and I would get in trouble from the Judge.

Q. What do you think the Judge would do to you?

A. I don't know.

Q. Do you think he'd put you in jail?

A. I don't know.

. . . .

Q. And would it be fair to say that the Judge – there's no way for the Judge to know whether you're really telling the truth or not; is that right?

. . . .

THE WITNESS: Can you please ask the question again?

Q. . . . Yeah. There's no real way for the Judge to know whether you're telling the truth or not, is there?

A. I don't know.

Q. Because he doesn't – he wasn't there in parts of your life that you would be telling him about, right?

A. Yes.

(Tr., Vol. 5, p.65, L.14 – p.66, L.16.)

As shown from K.A.M.'s testimony, Lester's attorney asked her what would happen to her if she did not testify truthfully, and whether the trial judge would know if she was being truthful. The first question – what would happen to her if she was untruthful – is how Lester's trial attorney alleged the prosecutor opened the door to recross-examination of K.A.M. (Tr., Vol. 5, p.93, Ls.7-10 ("talking about what would happen if she told a lie in court, reintroduced the question of her telling a lie.") Plainly, it was Lester's trial attorney who asked that question first.

In regard to the latter question, on redirect examination, the prosecutor asked K.A.M. whether she believed that "grownups" can tell if you are lying, and she answered "yes." (Tr., Vol. 5, p.92, Ls.2-4.) The thrust of the question by Lester's attorney and the prosecutor is the same, the only difference being that one is about "grownups" while the other concerns the trial judge. Lester's argument that the prosecutor's redirect questions opened up a new line of questions is belied by the record – Lester's own attorney ventured there first.[5] Therefore, the district court did not abuse its discretion in ruling that because Lester's attorney could have asked K.A.M. during cross-examination whether she had ever told a lie, but did not, he could not do so on recross-examination.

The applicable rule of evidence provides that cross-examination "should" be limited to the subject matter of direct examination and the credibility of the witness. The offer of proof made by Lester's trial counsel would not have added anything relevant to

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[5] Rather than the prosecutor's questions opening a new area of inquiry justifying recross-examination of K.A.M., Lester's attorney's cross-examination of K.A.M. opened the door for the prosecutor to ask her if she believed "grownups" could tell if she was lying. (Tr., Vol. 5, p.92, Ls.2-3); *see* Rauch, 144 Idaho at 685, 168 P.3d at 1032; Miles, 97 Idaho at 399, 545 P.2d at 487.

those issues. Asking K.A.M. whether she had ever told a lie would not have impeached her testimony that she believed adults could tell if she lied and would not have shown her to be incredible. If K.A.M. was asked if she had ever lied, and assuming she was not caught off-guard by the bluntness and obviousness of such a question, a "yes" answer would have been the only reasonable response. Conversely, a "no" answer would only serve to show that K.A.M., a child, misunderstood what such a blatant question intended. If, as Lester appears to contend on appeal, his attorney should have been allowed to inquire into K.A.M.'s testimony about "all adults" being able to tell if she was being truthful, it is difficult to conceive how such recross-examination of K.A.M. would have discredited her testimony.

Given the many questions K.A.M. fielded about her ability to tell the truth in court during every phase of her trial testimony, and the limited relevance of the question proposed by Lester's offer of proof (or the questions Lester claims, now on appeal, should have been asked) in yet a new round of questions in recross-examination, the district court was well within its discretion to curtail the questioning of K.A.M. – especially since Lester's attorney had a full opportunity to ask those questions during cross-examination, and effectively did so. Lester has failed to demonstrate any abuse of discretion in the district court's refusal to allow his attorney to conduct recross-examination of K.A.M.

Finally, even if the trial court erred in denying Lester's trial counsel the opportunity to conduct recross-examination of K.A.M., such error constitutes harmless error. For the reasons stated above, the recross-examination of K.A.M. would have been, at best, only marginally relevant to the jury's determination of K.A.M.'s credibility.

(*See* § D, *supra*, pp.10-15 and n.6.) Therefore, this Court can conclude, beyond a reasonable doubt, that the alleged error did not contribute to Lester's conviction. State v. Darbin, 109 Idaho 516, 522, 708 P.2d 921, 927 (Ct. App. 1985) (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

II.

Lester Has Failed To Establish His Fifth Amendment Right To Remain Silent Was Violated By The Prosecutor's Closing Argument Because Lester Was Not Silent

A. Introduction

Lester argues on appeal that the prosecutor's closing argument violated the exercise of his Fifth Amendment right to remain silent, by, over his objection, asking the jury to "consider [his] pre-arrest, pre-*Miranda* silence as substantive evidence of his consciousness of guilt."[6] (Appellant's Brief, pp.14-15.)

Lester's Fifth Amendment claim fails because he did not remain silent. Contrary to his argument, Lester made voluntary statements during a full interview with the investigating detective.[7] The prosecutor's closing arguments regarding Lester's statements and testimony were proper references to what he said, not impermissible comments on his "silence."

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[6] Lester fails to point out where the record demonstrates that he exercised his Fifth Amendment right to remain silent, or where the record reflects his arrest or his being given *Miranda* warnings. (*See generally*, Appellant's Brief, pp.14-18.)

[7] Although Lester specifically claims that his right to remain silent was violated during the pre-arrest, pre-*Miranda*, stage, it should be noted that in addition to voluntarily submitting to the out-of-custody interview by the detective, he also testified at both of his trials.

B. Standard Of Review

Whether the admission of evidence violates a defendant's right to remain silent is a constitutional question reviewed *de novo*. State v. Moore, 131 Idaho 814, 820, 965 P.2d 174, 180 (1998). Appellate courts conduct a two-tiered inquiry to review allegations of prosecutorial misconduct. First, the court determines whether the alleged misconduct was improper. If the court concludes that the conduct was improper, the court must then consider whether such misconduct resulted in prejudice to the defendant or was harmless error. State v. Romero-Garcia, 139 Idaho 199, 202, 75 P.3d 1209, 1212 (Ct. App. 2003).

C. Lester Has Failed To Establish A Due Process Violation

Although it is a due process violation to present evidence of a defendant's pre- or post-*Miranda* silence to infer guilt, Moore, 131 Idaho at 820, 965 P.2d at 180 and State v. Tucker, 138 Idaho 296, 62 P.3d 644 (Ct. App. 2003), it is axiomatic that a defendant must actually remain silent in order to invoke *Miranda*'s protections. Lester has not shown where or when he even attempted to exercise his Fifth Amendment right to remain silent prior to his arrest. More irnportantly, the record makes plain that Lester voluntarily decided not to be silent.

After K.A.M. was interviewed by "CARES," Ada County Sheriff's Detective Cherie Tucker left a voice message on Lester's phone, and when he called her back, she told him "that his name had come up in an investigation and [she] needed to speak with him . . .." (Tr., Vol. 5, p.141, Ls.10-19; p.149, Ls.2-20.) On September 29, 2009, Lester went to the Sheriff's Office on his own, and, after Detective Tucker told him he was free

to leave and did not have to answer any questions, he agreed to be interviewed. (Tr., Vol. 5, p.150, L.2 – p.151, L.10.) Detective Tucker then interviewed Lester in an interview room at the Sheriff's office for about 44 minutes; first about preliminary matters, then progressing to the specific allegations made by K.A.M., which Lester consistently denied. (Tr., Vol. 5, p.151, L.11 – p.157, L.1; p.192, L.22 – p.193, L.5; p.194, L.18 - p.197, L.6; Tr., Vol. 6, p.41, Ls.15-23; St.'s Ex. 1.)

Lester asserts that the prosecutor's closing argument "impermissibly referred to Lester's pre-*Miranda* silence by arguing to the jury that Lester did not "seek out law enforcement and confess his guilt." (Appellant's Brief, p.17.) Lester's argument cannot survive the fact that he did not remain silent, but chose instead to voluntarily talk about K.A.M.'s allegations with Detective Tucker, seemingly without reservation, and did so at length. "A defendant cannot have it both ways. If he talks, what he says or omits is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to." Vitali v. United States, 383 F.2d 121, 123 (1st Cir. 1967); *see* United States v. Vargas, 580 F.3d 274, 277 n.1 (5th Cir. 2009) (Vargas "answered several questions after the *Miranda* warnings had been given, making fair game both his answers and omissions."). Because Lester voluntarily gave statements to Detective Tucker during an interview prior to his arrest, he plainly chose not to exercise his Fifth Amendment right to silence at that time.

The prosecutor's reference to Lester's affirmative statements can hardly be considered equivalent to an impermissible reference to silence. The prosecutor told the jury it would know that Lester sexually molested K.A.M. only "because of what you hear from her," and "[n]ot because he ran out and felt guilty and told anybody about it and

then wanted to be found out." (Tr., Vol. 5, p.26, Ls.12-14) The prosecutor's very next comment -- "[i]n fact, it was quite the opposite" – reasonably spoke to the fact that, in his interview with Detective Tucker, Lester denied sexually molesting K.A.M. The prosecutor's comment did not – nor could it -- target a non-existent "exercise" of Lester's right to silence.

In sum, because Lester did not remain silent, the prosecutor's comments were related to his statements, not his silence. It was not improper for the prosecutor to discuss what Lester's statements did, or did not, disclose. As the prosecutor correctly pointed out, Lester failed to admit his offense, not by being silent, but by denying any wrongdoing during his interview with Detective Tucker. Lester has failed to demonstrate that the prosecutor's closing argument amounted to an impermissible reference to Lester's (alleged) pre-*Miranda* exercise of his Fifth Amendment right to silence.

Further, because Lester responded to Detective Tucker's first request to be interviewed, and during that interview he clearly denied any wrongdoing toward K.A.M., the jury would not have drawn any inference of guilt from Lester's failure to discuss the matter with the detective (or law enforcement) *prior* to the arranged interview. No rational juror would have concluded that Lester's "silence" before his interview with the detective was an indication of his guilt. Therefore, this Court can conclude, beyond a reasonable doubt, that the alleged error did not contribute to Lester's conviction. Darbin, 109 Idaho at 522, 708 P.2d at 927 (citing Chapman, 386 U.S. at 24).

III.

Lester Has Failed To Show That The Cumulative Error Doctrine Applies To This Case

Under the doctrine of cumulative error, a series of errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate to application of the doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). Lester has failed to show that two or more errors occurred in his trial, and therefore the doctrine is inapplicable to this case. *See, e.g.*, LaBelle v. State, 130 Idaho 115, 121, 937 P.2d 427, 433 (Ct. App. 1997). Even if errors in the trial had been shown, they would not amount to a denial of due process that would require reversal. State v. Gray, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997); State v. Barcella, 135 Idaho 191, 204, 16 P.3d 288, 301 (Ct. App. 2000) (accumulation of errors deemed harmless).

CONCLUSION

The state respectfully requests that this Court affirm Lester's conviction and sentence for lewd conduct with a minor under sixteen.

DATED this 12th day of September 2011.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September 2011, I served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defenders' basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm